Supreme Court, U.S.
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NO. 06-713 and NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,
Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

STATE OF WASHINGTON, ET AL.,
Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER WASHINGTON STATE GRANGE

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QUESTION PRESENTED FOR REVIEW

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court specified how States could structure a top-two primary system that does not violate the associational rights of a political party. The State of Washington subsequently enacted a top-two primary statute that the Washington State Grange had specifically drafted to comply with this Court's ruling in *Jones*. As counsel of record for the lead Respondent in this case has explained, that statute "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage." JA 692. One clause in Washington's new statute also allows a person running for certain offices to disclose on the ballot the name of the party (if any) that he or she personally prefers.

The Ninth Circuit invalidated Washington's top-two statute in its entirety, holding that the First Amendment prohibits a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot. This case accordingly presents the following question:

Does the First Amendment prohibit a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot?

PARTIES TO THE NINTH CIRCUIT PROCEEDING WHOSE JUDGMENT IS UNDER REVIEW

Defendant Washington State Grange: The Washington State Grange is the Petitioner in case no. 06-713. The Grange is described at JA 675-77. It sponsored the voter-approved Initiative Measure that enacted the top-two statute at issue. The Grange was aligned as Defendant-Intervenor in the U.S. District Court and as Appellant in the Ninth Circuit Court of Appeals.

Co-Defendants of the Grange: The Grange's co-defendants are the Petitioners in the related case no. 06-730. They are the State of Washington, its Attorney General Rob McKenna, and its Secretary of State Sam Reed. They were aligned with the Grange as Defendant-Intervenors in the U.S. District Court and as Appellants in the Ninth Circuit Court of Appeals. The U.S. District Court also substituted the State for the County Auditors who were the initial defendants in the trial court.

Plaintiffs: The Washington State Republican Party and its officials Diane Tebelius, Bertabelle Hubka, Steve Neighbors, Mike Gaston, Marcy Collins, and Michael Young; Washington State Democratic Central Committee and its official Paul Berendt; Libertarian Party of Washington State and its officials Ruth Bennett and J.S. Mills, are the Respondents in both case nos. 06-713 & 06-730. They collectively were aligned as Plaintiffs and Plaintiff-Intervenors in the U.S. District Court and as Appellees in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

RELIEF SOUGHT 1

OPINIONS & ORDERS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 2

A. United States Constitution 2

B. Washington State Constitution 2

C. Washington's Prior Party-Nominating Statute ("Montana" system) 4

D. Washington's Top-Two Statute (Initiative 872) 5

STATEMENT OF THE CASE 7

A. Summer 2000: This Court Strikes Down California's Party-Nominating Primary In *Jones*. 7

B. Fall 2003: Washington's Prior Party-Nominating Primary Is Struck Down In Reliance on *Jones*. 9

C. Spring 2004: Washington Adopts A "Montana" System In Response To *Jones* 10

D. Fall 2004: Washington Voters Replace The "Montana" System With A Top-Two System In Reliance On *Jones* (Initiative 872). 11

E. Summer 2006: Ninth Circuit Invalidates Washington's Top-Two Statute. 16

1. U.S. District Court Proceedings. 16

2. Ninth Circuit Proceedings. 16

3. The Ninth Circuit Decision. 17

SUMMARY OF ARGUMENT 18

ARGUMENT 21

A. The Ninth Circuit's Decision Turns The First Amendment On Its Head. 21

1. The Ninth Circuit properly recognized that every American running for office has a Constitutional right to state the name of the political party he or she prefers. 21

2. The Ninth Circuit improperly held that the First Amendment prohibits a State from allowing persons running for office to make his or her personal preference statement on the ballot. 22

B. The Ninth Circuit's Decision Also Contradicts This Court's Ruling In *Jones*. 29

1. Washington's top-two statute complies with *Jones*. 29

2. Different States have accordingly enacted different types of statutes that establish different types of election systems. 44

3. Citing what *other* States have done to define what *Washington* State must have done converts Federalism's freedom into a prison..... 46

CONCLUSION 48

2. The fact that a party has the right to select *its* candidate does not negate the Washington statute's compliance with *Jones*. 32

3. The fact that a party has the right to dictate its "membership" does not negate the Washington statute's compliance with *Jones*. 34

4. *Jones* compliance conclusion. 37

C. Revising The Washington Statute's "Candidate's Preference" Language To Instead Say "Party's Nominee" Violates Separation Of Powers. 37

1. The separation of powers doctrine prevents courts from re-writing statutes. 37

2. The Ninth Circuit's ruling is premised on re-writing "candidate's preference" to instead say "party's nominee" 38

3. Resort to "interpretation" does not justify re-writing the "candidate's preference" language of Washington's statute in order to strike it down. 39

4. Separation of powers conclusion 43

D. Confining *Washington* State To What *Other* States Have Done Transforms The Independence That Federalism Grants Into A Prison. 43

1. Federalism protects each State's freedom to serve as a laboratory of democracy. 43

TABLE OF AUTHORITIES

Cases

Ayotte v. Planned Parenthood of Northern New England,
546 U.S. 320, 126 S. Ct. 961 (2006).....37

Barson v. DSHS,
794 P.2d 538 (Wash. App. 1990).....26

California Democratic Party v. Jones,
530 U.S. 567 (2000)
.....7-9, 23, 29-31, 44-46, 47, passim

Cantwell v. State of Connecticut,
310 U.S. 296 (1940).....25-26

Citizens for Responsible Wildlife Management v. State,
71 P.3d 644 (Wash. 2003) 41

Clingman v. Beaver,
544 U.S. 581 (2005).....44-45

Democratic Party of Washington v. Reed,
343 F.3d 1198 (9th Cir. 2003).....10-11, 45-46, 47

Duke v. Cleland,
954 F.2d 1526 (11th Cir. 1992).....36, 45, 47

Duke v. Massey,
87 F.3d 1226 (11th Cir. 1996).....36, 45, 47

Eu v. San Francisco County Democratic Central Committee,
489 U.S. 214 (1989).....27

Gregory v. Ashcroft,
501 U.S. 452 (1991).....43-44

Grossman v. Will,
516 P.2d 1063 (Wash. App. 1973) 26

Heart of Atlanta Hotel v. U.S.,
379 U.S. 241 (1964) 37

Hurley v. Irish-American Gay, Lesbian & Bisexual Group,
515 U.S. 557 (1995) 36

In re Estate of Niehenke,
818 P.2d 1324 (Wash. 1991) 26

LaRouche v. Fowler,
152 F.3d 974 (D.C. Cir. 1998) 36

McGowen v. State,
60 P.3d 67 (Wash. 2002) 38, 41

Monitor Patriot v. Roy,
401 U.S. 265 (1971) 27

New State Ice v. Liebmann,
285 U.S. 262 (1932) 44, 48

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 25

Orient Foundation v. Coleman,
60 P.3d 595 (Wash. App. 2002) 40

Personal Restraint Petition of Matteson,
12 P.3d 585 (Wash. 2000) 40-41

Printz v. U.S.,
521 U.S. 898 (1997) 44

Public Disclosure Commission v. 119 Vote No! Committee,
957 P.2d 691 (Wash. 1998) 25

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 27, 28

Republican Party of Minnesota v. White,
416 F.3d 738 (8th Cir. 2005) 27

Rosen v. Brown,
970 F.2d 169 (6th Cir. 1992) 45, 47

Scales v. U.S.,
367 U.S. 203 (1961) 40

State v. Chapman,
998 P.2d 282 (Wash. 2000) 38, 39

State v. Enstone,
974 P.2d 828 (Wash. 1999) 40

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 45, 47

Terrace Heights Sewer District v. Young,
473 P.2d 414 (Wash. App. 1970) 26

Texas v. White,
7 Wall 700, 19 L. Ed. 227 (1869) 43

Timmons v. Twin City Area New Party,
520 U.S. 351 (1997) 24, 47

U.S. v. Booker,
534 U.S. 220, 125 S. Ct. 738 (2005) 41

U.S. v. Morrison,
529 U.S. 598 (2000) 44

Watson v. Wash. Preferred Life Insurance,
502 P.2d 1016 (Wash. 1972) 26

Whalen v. Roe,
429 U.S. 589 (1977) 44, 48

Constitutions

U.S. Constitution, amend. I ..... 2, passim
U.S. Constitution, amend. XIV 2
Wash. Const. art. II, §1 ..... 2-4, 11-12, 38

Statutes & Administrative Codes

28 U.S.C. §1331 ..... 1, 16
28 U.S.C. §1343 ..... 1, 16
Initiative 872 ..... 5-7, 11-16, passim
Initiative 872, §4 ..... 5, 13, 38, 42
Initiative 872, §5 ..... 6, 31
Initiative 872, §6(1) 6, 12-13, 31
Initiative 872, §7(3) 34, 38
Initiative 872, §9(3) 38
Initiative 872, §12 38
Cal. Elec. Code §15451 (1996 version) 7-8, 46
Montana Code. Ann. §§13-10-209,- 301 (2005) 10
Georgia Code §21-2-193 (1987) 45
Georgia Code §21-2-224 (2006) 10
Hawaii. Rev. Stat. §12-31 (2005) 10
Idaho Code Ann. §34-904 (2006) 10
Mich. Comp. Laws §§168.576, .570 (2006) 10
Minnesota Stat. §204D.08 (2006) 10

Missouri. Rev. Stat. §115.397 (2006) 10

North Dakota Cent. Code §16.1-11-22 (2005) 10

Ohio Rev. Code §3505.03 (1986) 45

Vermont. Stat. Ann. tit. 17 §§2262, 2263 (2005)..... 10

Virginia Code Ann. §24.2-530 (2006)..... 10

Wisconsin Stat. §§5.58, 5.62 (2005) 11

Wash. Rev. Code §29A.04.086..... 40

Wash. Rev. Code §29A.04.128
(version before I-872) 4, 11

Wash. Rev. Code §29A.36.191
(version before I-872) 4, 11

Wash. Rev. Code §29A.52.151 (2006) 10

Wash. Rev. Code §29.30.020(3)
(pre-2003 version) 9-10, 45-46

Wash. Rev. Code §29.30.095
(pre-2003 version) 9-10, 45-46

Wash. Rev. Code §42.17.020(10)..... 40

Wash. Admin. Code 434-215-012
(version before I-872) 5, 10, 11, 14, 45-46

Wash. Admin. Code 434-215-012
(version during I-872) 6, 14

Wash. Admin. Code 434-262-012
(version under I-872) .. 6-7, 14-15, 31-32, 33, 38-39

Additional Authorities

Webster's Ninth New Collegiate
Dictionary (1991) 35

RELIEF SOUGHT

The Washington State Grange respectfully seeks a reversal of the Ninth Circuit decision invalidating Washington's top-two election statute (Initiative 872).

OPINIONS & ORDERS BELOW

The Ninth Circuit's opinion is reported at 460 F.3d 1108 (Grange Pet. App. 1a-34a). Its others orders are unpublished (Grange Pet. App. 101a-111a).

The District Court's summary judgment and preliminary injunction opinion is reported at 377 F.Supp.2d 907 (Grange Pet. App. 35a-92a). Its permanent injunction order (Grange Pet. App. 97a-100a) and other orders (JA 139-40, 232-33, 821-28) are unpublished.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). This Court granted the Grange's Petition For A Writ Of Certiorari in this case no. 06-713 on February 26, 2007. The judgment of the Ninth Circuit was entered August 22, 2006. The District Court had federal question jurisdiction under 28 U.S.C. §§1331 & 1343.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

A. United States Constitution

The First Amendment of the United States Constitution provides:

> FREEDOM OF RELIGION, SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., amend. I (Grange Pet. App. 112a).

The Fourteenth Amendment of the United States Constitution provides in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

U.S. Const., amend. XIV, §1.

B. Washington State Constitution

The Article of the Washington State Constitution establishing the State's legislative branch provides in part:

> Legislative Powers, Where Vested. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be

called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. .... Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. .....

(d) .... All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: .... Such measure shall be in

> operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." ....

Wash. Const., art. II, §1 (Grange Pet. App. 113a-115a).

C. Washington's Prior Party-Nominating Statute ("Montana" system)

Immediately before Initiative 872, the State of Washington employed what is commonly called a "Montana" party-nominating system. It is set forth in full at JA 488-572.

Washington's version of that "Montana" system prints the candidates of different major parties on different ballots, and then places on the November general election the party's candidate who had received in the preceding primary "a plurality of the votes cast by voters affiliated with that party for candidates for that office affiliated with that party." Wash. Rev. Code 29A.36.191 in effect before I-872 (Grange Pet. App. 142a); see also. Wash. Rev. Code 29A.04.128 in effect before I-872 (Grange Pet. App. 141a) ("Primary. 'Primary' or 'primary election' means a statutory procedure for nominating candidates to public office at the polls.").

The corresponding declaration of candidacy accordingly had the person running for office declare him or her self as a candidate of a particular party:

> I ***am*** a ***candidate of*** the _____ party.

Wash. Admin. Code 434-215-012 in effect before I-872 (emphasis added) (Grange Pet. App. 129a, 131a, 134a).

D. Washington's Top-Two Statute (Initiative 872)

Initiative 872 ("I-872") replaced Washington's "Montana" system. The full text of Initiative 872 is set forth at Grange Pet. App. 116a-126a.

Initiative 872 changed Washington law to define "partisan office" as follows:

> "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name.

I-872, §4 (Grange Pet. App. 117a-118a).

The previously-noted declaration of candidacy was accordingly changed to allow persons running for office to make the following public disclosure instead:

my party ***preference*** is _____.

Wash. Admin. Code 434-215-012 until federal court enjoined I-872 (emphasis added) (Grange Pet. App. 129a, 137a).

Initiative 872 then redefined "primary" as follows:

> "Primary" or "primary election" means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election....

I-872, §5 (Grange Pet. App. 118a). And it specified a top-two runoff election as follows:

> For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second.

I-872, §6(1) (Grange Pet. App. 118a-119a).

Under this top-two system, Washington's election regulations provided:

> Pursuant to Chapter 2, Laws of 2005 [Initiative I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who

> receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. ***Voters at the primary election are not choosing a political party's nominees.***

Wash. Admin. Code 434-262-012 until the federal court enjoined I-872 (emphasis added) (Grange Pet. App. 140a).

STATEMENT OF THE CASE

This case revolves around this Court's ruling in *Jones* and the changes in Washington State law after that ruling. The following summarizes that history.

A. Summer 2000: This Court Strikes Down California's Party-Nominating Primary In *Jones*.

This Court struck down California's blanket primary law in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"). That law provided:

(1) A person could declare them self to be the candidate of any political party in the primary.

(2) Voters could vote for whomever they wanted in that primary.

(3) The State's general election ballot then designated as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.

Cal. Elec. Code §15451 (1996 version); *Jones*, 530 U.S. at 570.

This Court held that allowing people to self-declare themselves to be a candidate for a political party's nomination, and then allowing all voters to chose which one of those self-declared party candidates would be designated as that party's nominee on the general election ballot, violated that party's right to decide who would (and would not) be that party's nominee. 530 U.S. at 577-78.

The dissent argued that this Court's ruling would severely limit States' flexibility to adopt new types of primary systems in the future. 530 U.S. 600-01 (Stevens, J., dissenting).

This Court's majority opinion rejected the dissent's narrow reading of its *Jones* decision. This Court explained that States have broad latitude to allow all voters to vote for whomever they want in a State primary – just as long as State law does not designate the winner of that primary to be a party's nominee on the November election ballot. 530 U.S. at 572-73 & n.4.

To confirm that broad latitude, the *Jones* Court laid down a specific blueprint for how States can structure a top-two primary that is constitutional. That blueprint focused on the result specified by a State's primary law. And it confirmed

that a top-two primary is constitutional if it specifies the nonpartisan result of choosing the two most popular candidates overall instead of specifying the partisan result of choosing the nominee for a political party. As this Court's ruling explained:

> Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. ***This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.***

530 U.S. at 585-86 (emphasis added).

B. Fall 2003: Washington's Prior Party-Nominating Primary Is Struck Down In Reliance on *Jones*.

At the time of this Court's decision in *Jones*, Washington's primary law provided:

(1) A person could declare them self to be the candidate of any political party in the primary;

(2) Voters could vote for whomever they wanted in that primary;

(3) The State's general election ballot then designated as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.[1]

Since Washington's party-nominating law was similar to California's, Washington's law was stricken down in reliance on this Court's *Jones* ruling. *Reed*, 343 F.3d at 1203, 1207.

C. Spring 2004: Washington Adopts A "Montana" System In Response To *Jones*.

The Washington legislature responded by adopting the "Montana" system currently used in twelve States.[2] That "Montana" system provides:

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[1] Wash. Rev. Code §29.30.095 & .020(3) (pre-2003 version) (the party designation on the ballot signified "the political party...of each candidate") and the Declaration Of Candidacy under that statute which provided that the listing of a party name designated that person as a ***"candidate of"*** that political party. Wash. Admin. Code 434-215-012 (pre-2003 version) (Grange Pet. App. 129a, 131a, 134a). See also *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1201 (9th Cir. 2003).

[2] Grange Pet. App. 9a-10a. Those twelve States' statutes are: **Mont**. Code Ann. §§13-10-209, -301 (2005); **Ga**. Code Ann. §21-2-224 (2006); **Haw**. Rev. Stat. §12-31 (2005); **Idaho** Code Ann. §34-904 (2006); **Mich**. Comp. Laws §§168.576, .570 (2006); **Minn**. Stat. §204D.08 (2006); **Mo**. Rev. Stat. §115.397 (2006); **N.D.** Cent. Code §16.1-11-22 (2005); **Vt**. Stat. Ann. tit. 17 §§2262, 2263 (2005); **Va**. Code Ann. §24.2-530 (2006); **Wis**. Stat. §§5.58, 5.62 (2005); **Wash**. Rev. Code §29A.52.151 (2006).

(1) A person can declare them self to be the candidate of any political party in the primary.

(2) Voters cannot vote for whomever they want in the primary. Instead, they have to choose between voting for the candidates of one party or the other.

(3) The State's general election ballot then designates as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.

Wash. Rev. Code 29A.36.191 and 29A.04.128 in effect immediately before I-872 (Grange Pet. App. 142a & 141a); Wash. Admin. Code 434-215-012 in effect immediately before I-872 (Grange Pet. App. 129a, 131a, 134a).

D. Fall 2004: Washington Voters Replace The "Montana" System With A Top-Two System In Reliance On *Jones* (Initiative 872).

Washington voters used the Montana system for the first time in the September 2004 primary.

They did not like it. Two months later those same voters voted 60%-40% to replace the Montana statute with a top-two statute (Initiative 872). Grange Pet. App. 10a.

Washington's voters enacted this top-two statute pursuant to the legislative authority that they had expressly reserved to themselves in

Article II, section 1 of their State Constitution. (The relevant text of Washington's Constitution is set forth above at pages 2-4.)

As the Ninth Circuit acknowledged, Washington's new top-two primary law was designed to comply with this Court's ruling in *Jones*. Grange Pet. App. 110a-111a. As the following pages explain in more detail, Washington's new top-two law accordingly provided as follows:

(1) The declaration of candidacy for the primary was changed so a person could no longer declare them self to be the candidate of any political party.

(2) Voters would be allowed to vote for whomever they want in the primary.

(3) The State's general election ballot no longer designated any person as any party's nominee. Instead, that ballot designated the primary's top two vote getters.

As the following pages also confirm, the difference between Washington's top-two statute and the constitutional top-two statute described in *Jones* was the piece of Washington's statute that allows a person running for certain offices to disclose on the ballot the name of the political party (if any) which he or she personally prefers.

More specifically, Washington's new top-two statute provided that the top two vote getters in the State's primary advance to the November general election:

> Section 6(1): .... For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second. (Grange Pet. App. 118a-119a.)

Another part of this top-two statute permitted persons running for certain offices to disclose on the ballot the name of the party (if any) which he or she personally prefers. Washington's new statute defined those offices as "partisan offices" to tie the statute's use of the term "partisan" to the type of office being voted on rather than the type of result produced by that vote:

> Section 4: .... "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. (Grange Pet. App. 117a-118a.)

The State election regulations in the Washington Administrative Code ("WAC") were accordingly amended to reflect this new statute's fundamental change in the meaning of the declaration of candidacy filed by a person running for public office.

As noted earlier, the declaration of candidacy under Washington's prior party-nominating statutes had the person running for office declare him or her self to be a ***candidate of*** a political party:[3]

> I am a ***candidate of*** the _____ party.

Given the nonpartisan result specified by Washington's new top-two statute, however, the State changed its filing declaration to instead allow each person running for office to make the following public disclosure instead:

> my party ***preference*** is _____.

Wash. Admin. Code 434-215-012 until federal court enjoined I-872 (emphasis added) (Grange Pet. App. 129a, 137a).

As noted earlier, Washington's new top-two statute tied its use of the term "partisan" to the type of office being voted on rather than the type of result that vote produced. Washington's top-two election regulations according confirmed with respect to the above declaration's "partisan" statement of personal party preference that:

> Pursuant to Chapter 2, Laws of 2005 [the new top-two statute], a partisan primary does not serve to determine the nominees of a political party but serves to winnow

[3] Wash. Admin. Code 434-215-012 under the State primary statutes in effect before I-872 (emphasis added) (Grange Pet. App. 129a, 131a, 134a).

> the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. ***Voters at the primary election are not choosing a political party's nominees.***

Wash. Admin. Code 434-262-012 until federal court enjoined I-872 (emphasis added) (Grange Pet. App. 140a).

The Ninth Circuit therefore correctly noted that Washington's top-two statute left political parties free to hold conventions of their own to select their party nominees. Grange Pet. App. 22a-23a at n.17. And that is precisely what the Washington State Republican Party and Washington State Democratic Central Committee did during the short time period that Washington's top-two statute was in effect. Appellant Washington State Grange's Excerpts of Record in the Ninth Circuit (CA nos. 05-35774 & 05-35780) at ER 033-036, 039, 041-043, 046.

In short, Washington's new top-two statute specified that the State primary determines the two most popular candidates for the November ballot. And for certain offices (defined as "partisan offices"), that new statute also permitted each person running for that office to openly disclose to voters the name of

the partisan political party (if any) which he or she personally preferred.

E. Summer 2006: Ninth Circuit Invalidates Washington's Top-Two Statute.

1. U.S. District Court Proceedings.

The Washington State Republican Party filed a facial challenge to the constitutionality of Washington's top-two statute in May 2005. Grange Pet. App. 37a & 52a. The Washington State Democratic Central Committee and Libertarian Party Of Washington State intervened as additional plaintiffs. Grange Pet. App. 10a-11a.

The top-two Initiative Measure's sponsor (the Washington State Grange) intervened as defendant, as did the State of Washington with its Attorney General and Secretary of State. Grange Pet. App. 10a-11a. By agreement, the District Court substituted the intervenor-State for the County Auditors who had originally been named as defendants. Grange Pet. App. 11a.

The District Court had federal question jurisdiction under 28 U.S.C. §§1331 & 1343. In July 2005, it entered summary judgment invalidating Washington's top-two statute in its entirety. Grange Pet. App. 11a.

2. Ninth Circuit Proceedings.

The Grange and State both appealed. The Ninth Circuit consolidated this matter under the Grange's appeal, and ultimately assigned this

Washington case to a Ninth Circuit panel from Southern California (Pasadena). Grange Pet. App. 103a-104a, 3a.

3. The Ninth Circuit Decision.

The Ninth Circuit panel recognized that for the purposes of this facial challenge, it had to assume "the ballots clearly state that a particular candidate ***'prefers'*** a particular party". Grange Pet. App. 24a-25a at n.20 (emphasis added).

The Ninth Circuit also recognized that permitting a person running for office to tell voters the name of the party he or she personally prefers gives voters important information about that person – noting that such a preference statement gives voters a shorthand description of that person's views "on matters of public concern" as well as his or her "substantive and ideological positions". Grange Pet. App. 19a-21a, 27a, 29a. The Ninth Circuit therefore acknowledged that persons running for office have a fundamental right to express their political party preference. Grange Pet. App. 26a.

The Ninth Circuit nonetheless held that the First Amendment rendered Washington's top-two statute unconstitutional in its entirety.

First, it held that the top-two system authorized by this Court in *Jones* was a "true" nonpartisan primary without <u>any</u> party names appearing on the ballot. Grange Pet. App. 30a. Based on that no-party-name-may-ever-be-spoken reading of *Jones*, the Ninth Circuit invalidated Washington's statute "because the primary under

Initiative 872 is not the kind of nonpartisan election *Jones* contemplated." Grange Pet. App. 15a.

Second, the Ninth Circuit held that the First Amendment prohibits a person running for office from disclosing the name of the party he or she prefers on the ballot because such speech "occupies a privileged position as the only information about the candidates (apart from their names) that appears on the primary ballot." Grange Pet. App. 20a.

The Ninth Circuit worried that a hypothetical "Candidate W" might not tell the truth about which party he preferred. It was also concerned that a voter who had not read Washington's new top-two statute might think that Candidate W's statement as to the party ***he*** preferred meant instead that he was the candidate which that ***party*** preferred, agreed with, selected, or nominated. Grange Pet. App. 22a-26a. Concluding that a Washington voter might be misled by the personal preference statement allowed by one piece of Washington's top-two statute, the Ninth Circuit struck down that top-two statute in its entirety. Grange Pet. App. 25a. 26a, 33a-34a.

SUMMARY OF ARGUMENT

There is only one constitutionally significant difference between Washington's top-two statute and the one authorized by this Court in *Jones*. Washington's statute allows a person running for certain offices to disclose the name of the political party he or she personally prefers on the ballot.

The Ninth Circuit held that allowing that personal preference disclosure violates the First

Amendment. The fundamental question for review is therefore whether the First Amendment prohibits a State from permitting a person running for public office to disclose the name of the party he or she personally prefers on the ballot.

The answer is "no".

First: The First Amendment protects free speech. Especially in the political arena. And if a person running for public office personally prefers one political party or another, the name of the party he or she prefers is an undeniably useful piece of information for a voter to know.

The State statute at issue permits a person running for certain offices to disclose that important piece of information about him or her self in a place where all voters will see it – i.e., next to his or her name on the ballot. The Ninth Circuit's holding that the First Amendment prohibits this disclosure to voters of a highly relevant piece of information turns the First Amendment's protection of free speech on its head.

Second: This Court held in *Jones* that the "constitutionally crucial" distinction between a partisan party-nominating primary and a nonpartisan candidate-winnowing primary is the result specified by the State law at issue. Does State law specify that the primary determines the parties' nominees for the November ballot, or does it specify that the primary determines the top two vote getters for a runoff regardless of party or partisanship?

Washington's top-two statute specifies the latter. The Ninth Circuit's striking down that

statute as an unconstitutional party-nominating primary disregarded the "constitutionally crucial" distinction established by this Court in *Jones*.

Third: The bedrock separation of powers principle underlying our constitutional form of government prohibits the judicial branch from rewriting statutory language enacted by the legislative branch.

As written, the statutory provision at issue states that the election ballot for certain offices may disclose the personal party "***preference***" of a "candidate". The Ninth Circuit, however, effectively re-wrote that statutory language to instead state that the election ballot designates the "***nominee***" of a "party". That re-writing of statutory language – especially when done by a federal court to create a justification for striking down a State statute – violates the separation of powers doctrine.

Fourth: One of the constitutional virtues of federalism is that it frees each of our Nation's 50 States to serve as laboratories of democracy. Thus, in Justice Brandeis's often quoted words, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

In this case the Ninth Circuit relied on decisions describing the election laws enacted by other States to describe the top-two statute enacted by Washington State. The Ninth Circuit's general reasoning was that since the ballots in other States use party names to designate political party nominees, then the ballots in Washington State must

do that too. Relying on the election structure commonly erected by other States to dictate or confine what Washington State does effectively converts the freedom that federalism had granted to those other States into a prison that now restrains Washington State from doing anything different. That approach eviscerates the independence and flexibility that federalism assures to each of our 50 separate States to serve as effective laboratories of democracy in our Nation.

ARGUMENT

A. The Ninth Circuit's Decision Turns The First Amendment On Its Head.

1. The Ninth Circuit properly recognized that every American running for office has a Constitutional right to state the name of the political party he or she prefers.

The Ninth Circuit properly acknowledged that every person running for office has a fundamental right to express his or her political party preference. Grange Pet. App. 26a.

It also properly acknowledged that allowing a person running for office to disclose the name of the party he or she prefers gives voters important information about that person – repeatedly noting that such a statement can give voters a shorthand description of that person's views "on matters of

public concern" as well as that person's "substantive and ideological positions".[4]

2. The Ninth Circuit improperly held that the First Amendment prohibits a State from allowing persons running for office to make his or her personal preference statement on the ballot.

The Ninth Circuit held that the First Amendment nonetheless prohibits a person running for office from stating the name of the party he or she personally prefers on the ballot. The Ninth Circuit reasoned that the First Amendment requires States to make election ballots a speech-free zone because speech on a ballot "occupies a privileged position as the only information about the candidates (apart from their names) that appears on the primary ballot." Grange Pet. App. 20a.

That speech-free-zone reasoning has several fatal flaws.

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[4] More specifically, the Ninth Circuit noted that such a statement serves as a shorthand term to "signal a candidate's substantive and ideological positions" (Grange Pet. App. 27a); provides voters a shorthand description of the candidate's views "on matters of public concern" and can be an "important influence on political opinions and voting" (Grange Pet. App. 21a); can be "powerful" since voters might rely upon it in casting their vote (Grange Pet. App. 19a); "plays a role in the process by which voters inform themselves for the exercise of the franchise" (Grange Pet. App. 27a); "plays a role in determining which candidates voters select" (Grange Pet. App. 20a); and can be informative since a candidate's " 'party preference' conveys to voters" a shorthand designation of his or her views "on matters of public concern" (Grange Pet. App. 29a).

First, it ignores the fact that the constitutional top-two primary specified by this Court in *Jones* expressly allows a State to permit political speech on the ballot next to a person's name. This Court expressly held that the ballot in a constitutional top-two system *may* include political speech by a political party – i.e., a statement by that party telling voters which person is its nominee. *Jones*, 530 U.S. at 585-86.

In other words, *Jones* established that the State of Washington may – not "must", but "may" – allow the Washington State Republican Party, the Washington State Democratic Central Committee, the Libertarian Party of Washington State, the Green Party of Washington State, the American Heritage Party of Washington, the Workers World Party, the Communist Party of Washington State, the Natural Law Party of Washington State, the Natural Medicine Party, the Progressive Party of Washington, the Reform Party of Washington, and any other party in Washington, to put a political statement on the ballot telling voters which person is its nominee.

In short, the Ninth Circuit's conclusion that Washington's statute is unconstitutional because the First Amendment prohibits any political speech on ballot contradicts this Court's ruling in *Jones*.

Second, the Ninth Circuit's conclusion that ballots must be a speech free zone leads to an absurd result. If it is unconstitutional for a State to allow a person to make a short statement on the ballot to give voters a piece of information which that person thinks is politically significant about him or her self,

then it is equally unconstitutional for a State to allow a political party to make a short statement on the ballot to give voters a piece of information which that party thinks is politically significant about that person.

Under the Ninth Circuit's speech-free-zone reasoning, no information about a person running for office (other than his or her name) can constitutionally appear on a State's election ballot. No personal party preference statement by any person running for office. No party nomination statement by any political party. No speech about the person running for office other than his or her name. Although that result has its virtues, it is not a result mandated by our federal Constitution.

Third, the Ninth Circuit's suggestion that *Timmons* prohibits a State from allowing political speech on the ballot (Grange Pet. App. 26a) is wrong.

Timmons v. Twin City Area New Party, 520 U.S. 351 (1997), held the Constitution does not require States to allow a political party to use the ballot to tell voters the name of the person it selected as its nominee. That does not mean the Constitution prohibits States from allowing a person to use the ballot to tell voters the name of the party he or she personally prefers.

Fourth, although the Ninth Circuit notes that a hypothetical "Candidate W" might not be completely candid when he states the political party he prefers (Grange Pet. App. 22a-23a), that notion has no weight under First Amendment law, and does

not support the Ninth Circuit's speech-free-zone ruling.

Given our Constitution's vigorous protection of unfettered political free speech, this Court established long ago that the First Amendment protects not only truthful and accurate speech in the political arena, but also exaggeration, vilification, and outright false statements. *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940); accord, New *York Times Co. V. Sullivan*, 376 U.S. 254, 272 (1964) ("Constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered"); *Public Disclosure Commission. v. 119 Vote No! Committee*, 957 P.2d 691, 695 (Wash. 1998) (State law cannot prohibit falsity in political debate). The notion that a person's statement in the future might not be true has never been a valid ground upon which to ban the making of such statements in the political arena.

Fifth, although the Ninth Circuit also suggests that some voters might not understand that the party name on the ballot designates Candidate W's personal preference for that party instead of that party's nomination of Candidate W (Grange Pet. App. 23a-25a), that suggestion has no legal weight and does not support the Ninth Circuit's ruling.

The top-two statute enacted by Washington's voters expressly states that the party name appearing on the ballot is the candidate's statement of his or her personal party preference. It makes no logical sense to claim that Washington voters don't know what the statute they overwhelming voted to enact says.

It also makes no legal sense. Washington law holds that all citizens are deemed to know what the law says[5] – a principle that makes particular sense here because the law that voters are being deemed to know is the same law they recently voted to enact.

And it makes no First Amendment sense – for even if Candidate W's speech might be misleading, the previously noted *Cantwell* line of cases confirms that that does not justify its prohibition.

In short, the Ninth Circuit's underlying premise that Washington's top-two statute must be struck down because some of the voters who enacted that statute might not understand what they enacted reveals a big-brother-knows-best paternalism that has no legal basis under our Constitution.

Sixth, and perhaps most direct, the Ninth Circuit's reliance on the informative value of a person's personal party preference as the justification for prohibiting a State from allowing that personal preference statement on the ballot misses the fundamental purpose of the First

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[5] E.g., *Barson v. DSHS*, 794 P.2d 538, 54 n.1 (Wash.App. 1990) (appellant is presumed to know the law governing the appellate process, and thus the import of statements by the administrative law judge); *In re Estate of Niehenke*, 818 P.2d 1324, 1329 (Wash. 1991) (testator is presumed to the law governing wills, and thus the effect of Washington's anti-lapse statute); *Watson v. Wash. Preferred Life Insurance*, 502 P.2d 1016, 1020 (Wash. 1972) (shareholders are presumed to know the law governing corporations, and thus how their absence counts as a "vote" at a shareholders meeting); *Terrace Heights Sewer District v. Young*, 473 P.2d 414, 417 (Wash.App. 1970) (citizen is presumed to know the law governing municipal officials, and thus the limits of those officials' contracting authority); *Grossman v. Will*, 516 P.2d 1063, 1068 (Wash.App. 1973) (person is presumed to know the law governing agency, and thus the scope of opposing counsel's settlement authority).

Amendment. As this Court explained in *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82 (2002), "the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." (Emphasis in original.)

"Protection of political speech is the very stuff of the First Amendment." *Republican Party of Minnesota v. White*, 416 F.3d 738, 748 (8th Cir. 2005). This Court has accordingly declared that the First Amendment's free speech guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot v. Roy*, 401 U.S. 265, 272 (1971).

This Court has therefore repeatedly recognized that allowing a candidate to tell voters what he or she believes qualifies him or her for public office is a core First Amendment freedom. *Republican Party of Minnesota*, 536 U.S. 765, 781-82 (2002) ("We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election"); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-24 (1989) (a ban on speech about persons running for public office "directly affects speech which is at the core of our electoral process and of the First Amendment freedoms. .... Indeed, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.").

The Ninth Circuit's ruling thus turns our Constitution on its head, reading the First

Amendment's paramount protection of political speech to instead be a restriction that grants political parties the power to control or censor the free speech of persons running for public office. As this Court explained in *Republican Party of Minnesota*:

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. ... [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Republican Party of Minnesota, 536 U.S. at 781-82 (internal quotation marks & citations omitted; italics & ellipses in original).

In summary, there is no basis in law or our Constitution for the Ninth Circuit's conclusion that the First Amendment requires States to make their election ballots a speech-free zone where a person running for office is prohibited from telling voters important information about him or her self, such as

the name of the political party (if any) that he or she personally prefers. To the contrary, this Court's First Amendment jurisprudence confirms that if a State chooses to allow persons running for office to make that disclosure to voters on the ballot, then the First Amendment protects that political speech from the type of prior restraint that the Ninth Circuit effectively issued in this case by striking down Washington's top-two statute before a single ballot could be printed pursuant to that State law. The Ninth Circuit's judgment must be reversed because it conflicts with the First Amendment free speech decisions of this Court.

B. The Ninth Circuit's Decision Also Contradicts This Court's Ruling In *Jones*.

1. Washington's top-two statute complies with *Jones*.

This Court reaffirmed in *Jones* that "States have a major role to play in structuring and monitoring the election process, including primaries." 530 U.S. at 572. This Court accordingly laid down a blueprint for a constitutional top-two primary that States can tailor to their particular circumstances and adopt. 530 U.S. at 585-86.

The Ninth Circuit's decision to strike down the top-two statute that Washington enacted to comply with that *Jones* ruling is based on the Ninth Circuit's premise that *Jones* required a "true" nonpartisan primary without any party names appearing on the ballot. Grange Pet. App. 30a.

But the Ninth Circuit's premise is factually incorrect. The blueprint laid down in *Jones* expressly noted that States have the option of allowing the ballot to include partisan party names (e.g., a partisan name showing nomination by an established party). 530 U.S. at 585-86.

The Ninth Circuit's premise is also inconsistent with this Court's legal ruling.

The constitutionally crucial characteristic of the "nonpartisan" top-two primary specified in *Jones* was not the absence of any partisan party name anywhere on the primary ballot. Rather, this Court held that the constitutionally crucial characteristic is whether State law provides the nonpartisan result of having primary voters choose the top two vote getters overall instead of the top vote getter (nominee) for each political party. As *Jones* held:

> Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save ***the constitutionally crucial one: Primary voters are not choosing a party's nominee.***

Jones, 530 U.S. at 585-86 (emphasis added).

Washington's top-two statute provides such a system. Unlike the California law struck down in *Jones* and the cases upon which that decision relied, Washington's law expressly provides that primary voters are selecting the top two vote getters overall for the November general election, and that those primary voters are not choosing any political party's nominees.

Washington's top-two statute specifies with respect to the primary that:

> "Primary" or "primary election" means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election....

I-872, §5 (Grange Pet. App. 118a). And it then specifies with respect to the November general election that:

> For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second.

I-872, §6(1) (Grange Pet. App. 118a-119a).

Washington law accordingly specified that this statute's top-two primary

> does not serve to determine the nominees of a political party but serves to winnow

> the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... ***Voters at the primary election are not choosing a political party's nominees.***

Wash. Admin. Code 434-262-012 until the federal court enjoined I-872 (emphasis added) (Grange Pet. App. 140a).

Washington's top-two statute was specifically drafted and enacted to comply with this Court's ruling in *Jones*. Washington's top-two statute does comply. The Ninth Circuit's decision to nonetheless invalidate it must be reversed because that decision directly contradicts this Court's ruling in *Jones*.

2. The fact that a party has the right to select *its* candidate does not negate the Washington statute's compliance with *Jones*.

The Ninth Circuit correctly noted that a political party has the right to select ***its*** candidate or nominee.

That point is irrelevant to whether Washington's top-two statute is unconstitutional, however, because Washington's top-two statute does not say that the State primary selects the ***political parties'*** candidates or nominees for the

November general election. Instead, it says the State primary selects the two ***most popular*** candidates for a November runoff – regardless of partisanship or party. As the governing election regulations unequivocally state, Washington's top-two primary "***does <u>not</u> serve to determine the nominees of a political party*** but serves to winnow the number of candidates to a final list of two for the general election. The candidate who receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... ***Voters at the primary election are <u>not</u> choosing a political party's nominees.***" Wash. Admin. Code 434-262-012 until the federal court invalidated the top-two statute (Grange Pet. App. 140a) (emphasis added).

Unlike the election laws in *Jones*, *Reed*, and the other cases cited by the Ninth Circuit, Washington's top-two law does not say that persons on the primary ballot are the "candidate of" any political party. And it does not say the primary selects any political party's "nominee" for the November ballot.

Instead, Washington's top-two statute left every political party free to conduct whatever convention, process, parade, or contest of its own that it wanted in order to select ***its*** party nominee, representative, or standard bearer.[6] And that is

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[6] The Ninth Circuit itself confirmed that Washington's top-two statute left parties free to hold their own nominating conventions. Grange Pet. App. 22a-23a at n.17.

exactly what political parties in Washington did while Washington's top-two statute was in effect.[7]

In short, the fact that a political party has a right to select ***its*** candidate or nominee has no bearing on whether Washington's top-two statute is unconstitutional because that statute's top-two primary does not select party candidates or party nominees.

3. The fact that a party has the right to dictate its "membership" does not negate the Washington statute's compliance with *Jones*.

The Ninth Circuit also correctly noted that a political party has the right to exclude people it doesn't like from party membership.

That point is irrelevant to whether Washington's top-two statute is unconstitutional, however, because Washington's top-two statute does not say that a person can self-designate his or her party ***membership***.

Indeed, the text of Washington's top-two statute says nothing about party ***membership*** at all. Instead, it states that a person may designate his or her personal ***preference*** on the ballot. Initiative §7(3) (Grange Pet. App. 119a-120a). The undersigned counsel of record's college football team preference is Notre Dame. But as the common

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[7] Supra at page 15.

English meaning of the word "preference" confirms,[8] that does not mean he is (or ever could be) a member of the Notre Dame football team.

Nor does allowing a person to disclose the name of the party he or she personally prefers change that party's membership rules. For example, it does not change the membership rules that the political parties in this case currently follow – such as granting membership to anyone who signs a statement saying he or she is a member or writes the party a check,[9] or granting membership to persons who openly oppose that party's core political positions.[10] Washington's top-two statute simply does not establish political party membership rules, and does not prevent any of the political parties in this case from changing their membership rules to start, for example, basing membership on political position instead of cash donation.

Nor does Washington's top-two statute mandate what party members can or cannot do as

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[8] E.g., Webster's Ninth New Collegiate Dictionary (1991) at 927, defining "preference" as "the state of being preferred", and defining "prefer" as "to like better or best".

[9] Appellant Washington State Grange's Supplemental Excerpts of Record in the Ninth Circuit (CA nos. 05-35774 & 05-35780) at ER 154:1-5, 155:14-16, 134-136, 137, 132, evidence summarized at 151:6-8 & nn. 42-43.

[10] For example, both the Washington State Republican Party and Washington State Democratic Central Committee openly accept as members of their legislative caucuses elected officials who oppose the abortion position in their respective State Party platforms. Appellant Washington State Grange's Supplemental Excerpts of Record in the Ninth Circuit (CA nos. 05-35774 & 05-35780) at ER 119, 123, 139-143, 146, 148, evidence summarized at 151:9-14 & nn. 44-45.

members. For example, unlike the State statute in decisions like the *David Duke* case cited by the Ninth Circuit,[11] Washington's statute is not a State mandated nomination procedure for State party members. And unlike the situation in the *Fowler* case often cited by the political parties,[12] Washington's statute does not select delegates for any party members' nominating convention.

The privately sponsored parade in the *Hurley* case often cited by the political parties[13] similarly has no application here – for under Washington's top-two statute, the State's September primary is no longer the political parties' parade. No case holds that an entity which is not the parade sponsor (e.g., the Democratic Central Committee) can commandeer and dictate rules for the entity which is the sponsor (e.g., the State of Washington).

In short: the fact that a political party has a right to exclude people it doesn't like from party ***membership*** has no bearing on whether Washington's top-two statute is unconstitutional, because Washington's top-two statute does not say that the ballot lists a person's party ***membership***, and it does not establish or impose any party membership rules or mandates.

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[11] Grange Pet. App. 13a-14a *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996); see also *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992).

[12] *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir 1998).

[13] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

4. *Jones* compliance conclusion.

Washington's top-two statute was specifically drafted and enacted to comply with this Court's ruling on the associational rights of political parties in *Jones*. As explained above, Washington's top-two statute does comply. The Ninth Circuit's decision must be reversed because it contradicts this Court's ruling in *Jones*.

C. Revising The Washington Statute's "Candidate's Preference" Language To Instead Say "Party's Nominee" Violates Separation Of Powers.

1. The separation of powers doctrine prevents courts from re-writing statutes.

Separation of powers between the executive, legislative, and judicial branches is a bedrock foundation of our democracy.

This Court has therefore repeatedly recognized that the judicial branch cannot re-write language that the legislative branch has enacted. E.g., *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 126 S. Ct. 961, 968 (2006) ("Mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrite[ing] state law"); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 261 (1964) ("This is a matter of policy that rests entirely with the Congress not with the courts").

Washington State law with respect to the State statute at issue in this case is the same – and

accordingly holds that a statute "means exactly what it says." *State v. Chapman*, 998 P.2d 282, 289 (Wash. 2000).[14]

2. The Ninth Circuit's ruling is premised on re-writing "candidate's preference" to instead say "party's nominee".

The Ninth Circuit's reasoning read Washington's top-two statute to have the same party "candidate", "nominee", and "member" language as the statutes in cases such as *Jones*, *Reed*, and *Duke*.

But Washington's statute does not have that language. As written, it expressly states instead that the party name appearing on a ballot is a statement by the individual candidate of his or her personal ***preference***. E.g., Initiative §4 ("candidate may indicate a political party ***preference***"), §7(3) ("if a candidate has expressed a party or independent ***preference***"), §9(3) ("a place for the candidate to indicate his or her ... party ***preference***"), §12 ("his or her party ***preference***") (Grange Pet. App. 117a, 119a, 121a, 123a) (emphasis added). As the Washington Administrative Code provisions promulgated to implement this statute's express language accordingly confirmed: "Voters at the primary election are not choosing a political party's

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[14] With respect to the "legislative" nature of the statute in this case, recall that Washington's voters enacted the top-two statute pursuant to the legislative authority they had reserved to themselves in Article II, section 1 of their State Constitution. Supra at pages 2-4; accord, *McGowen v. State*, 60 P.3d 67, 72 (Wash. 2002) ("When the people approve an initiative measure, they exercise the same power of sovereignty as the Legislature does when it enacts a statute").

nominees." Wash. Admin. Code 434-262-012 until the federal court enjoined the top-two statute (Grange Pet. App. 140a) (emphasis added).

The Ninth Circuit ignored the statutory language stating that the party name on the ballot designated the individual candidate's personal "preference", and effectively re-wrote that language to instead say that the party name on the ballot designated the political party's "candidate", "nominee", or "member". That statutory re-writing by the courts violated bedrock separation of powers principles.

3. Resort to "interpretation" does not justify re-writing the "candidate's preference" language of Washington's statute in order to strike it down.

Resort to "interpretation" cannot justify the Ninth Circuit's revision of the top-two statute's language for many reasons.

First, as noted before, Washington law holds that the language in a Washington statute "means exactly what it says." *State v. Chapman*, 998 P.2d 282, 289 (Wash. 2000).

The statute here says the party name on the ballot next to a person's name is that individual candidate's personal ***preference***. That statutory language means exactly what it says. Any "interpretation" crusade accordingly ends right here.

Second, even if one were to proceed farther and compare this statute with other Washington statutes, one would note that other Washington

statutes use the terms "candidate of", "nominee", and "member" of a political party.[15] Washington law holds that it is an "elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." E.g., *State v. Enstone*, 974 P.2d 828, 830 (Wash. 1999); *Orient Foundation v. Coleman*, 60 P.3d 595, 598-99 (Wash.App. 2002) (same).

The fact that Washington's top-two statute does not use the "candidate of", "nominee", or "member" language of other Washington statutes only confirms the impropriety of the lower court's re-writing the top-two statute to substitute that language here.

Third, any "interpretation" done would have to comply with the corollary to the judicial branch's separation from (and respect for) the legislative branch – the corollary that requires courts to construe a statute in a way that renders it constitutional if possible so as to avoid striking it down. E.g., *Scales v. U.S.*, 367 U.S. 203 (1961);[16] *Personal Restraint Petition of Matteson*, 12 P.3d 585, 589 (Wash. 2000) ("Whenever possible, it is the duty of [the] court to construe a statute so as to uphold its

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[15] Wash. Rev. Code §29A.04.086; Wash. Rev. Code §42.17.020(10).

[16] The challenger in *Scales* claimed that a federal statute criminalizing membership in the communist party violated his First Amendment freedom of association. 367 U.S. at 224. Noting that federal courts avoid construing a statute to be unconstitutional when possible, this Court interpreted that statute to have an implied element of specific intent to overthrow the government through violence – thereby preserving the statute's constitutionality. 367 U.S. at 221-22 & 229.

constitutionality"); *Citizens for Responsible Wildlife Management v. State*, 71 P.3d 644, 650, 655-56 (Wash. 2003) (construing Initiative to preserve its constitutionality).

The Ninth Circuit, however, did the opposite. It read the clause in the top-two statute that allows a person to disclose his or her personal party preference on the ballot to mean something other than what the written language of that clause says in order to strike the entire statute down as unconstitutional.

Fourth, even if that clause of Washington's top-two statute were interpreted in a way to render that clause's personal preference disclosure on the ballot unconstitutional, the court's duty would be to sever that offending clause rather than strike down the entire top-two statute in its entirety. E.g., *U.S. v. Booker*, 125 S.Ct. 738, 764 (2005) (courts "must refrain from invalidating more of the statute than is necessary. Indeed, [courts] must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute") (internal quotation marks & citations omitted); *McGowen v. State*, 60 P.3d 67, 75-76 (Wash. 2002) (severing unconstitutional provision from Initiative Measure to preserve it from being stricken down in its entirety).

Thus, even if it were unconstitutional for a State to allow a person running for office to disclose the name of the political party he or she personally prefers on the ballot, the judicial restraint mandated by the separation of powers doctrine would require

this Court to simply strike down the one clause in Initiative §4 that reads "...and have that preference appear on the primary and general election ballot in conjunction with his or her name."

Fifth, the Ninth Circuit's decision to read the words of Washington's top-two statute to say something different from what those words say seems to be based on the Ninth Circuit's concern that some Washington voters might not understand what the party name on Washington's top-two ballot means. The Ninth Circuit posited a hypothetical about a "wild-eyed radical who purports to prefer the Republican Party" (the previously-noted "Candidate W") – and ultimately concluded that the federal courts' allowing that "wild-eyed radical" to state his party preference on a Washington State ballot "may" be misleading to a voter who thinks the party Candidate W purported to prefer in turn preferred, agreed with, selected, or nominated him. Grange Pet. App. 22a-26a.

This hypothetical's presumption that a Washington State voter "may" be misled or confused about what the personal preference statement on a Washington State ballot means disregards the previously-noted principle in Washington State that all citizens are deemed to know what the law says – which makes particular sense here since the law voters are being deemed to know is the same law they recently enacted. Supra page 26 & n.5.

The Ninth Circuit's decision to effectively re-write the wording of the personal preference clause in Washington's top-two statute based on the court's concern about how a voter might be misled by

a hypothetical "wide-eyed radical" was, undoubtedly, sincere. But it also violated the fundamental separation of powers mandate that the judicial branch cannot re-write statutory language.

4. Separation of powers conclusion.

As written, Washington's top-two statute expressly states that any party name appearing on the ballot designates the candidate's personal ***preference***. As long as separation of powers survives, no court – federal or state – has the legal authority to re-write that statutory language to instead provide that the party name appearing on the ballot designates the political party's ***candidate***, ***member***, or ***nominee***. The Ninth Circuit's judgment based on its revision of the top-two statute's express language must accordingly be reversed.

D. Confining *Washington* State To What *Other* States Have Done Transforms The Independence That Federalism Grants Into A Prison.

1. Federalism protects each State's freedom to serve as a laboratory of democracy.

The United States Constitution created a dual system of government under which power is divided between the States and the federal government. E.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 7 Wall 700, 725, 19 L.Ed 227 (1869)). One purpose of this dual sovereignty or federalism is to protect citizens and State

legislatures from federal officials exercising too much power.[17]

Another fundamental purpose of this dual sovereignty is to allow States the freedom and flexibility to tailor solutions to matters of local concern. This Court has therefore "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern", and has recognized "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Whalen v. Roe*, 429 U.S. 589, 597 (1977) (quoting *New State Ice v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J. dissenting)).

2. Different States have accordingly enacted different types of statutes that establish different types of election systems.

Structuring election laws is one of the previously noted areas of local concern firmly within the province of the States. E.g., *Jones*, 530 U.S. at 572 ("States have a major role to play in structuring and monitoring the election process, including primaries"); *Clingman v. Beaver*, 544 U.S. 581, 586

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[17] See *U.S. v. Morrison*, 529 U.S. 598, 616 (2000) ("The Framers crafted the federal system of Government so that the people's rights would be secured by the division of power"); *Gregory*, 501 U.S. at 458 (the federal government is limited to the powers in the Constitution, while all remaining powers are reserved to the States or the People); *Printz v. U.S.*, 521 U.S. 898, 934 (1997) (protection of State legislatures from forced federal direction).

(2005) (States have "broad powers" to enact laws governing elections); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986).

Thus, as the State election statutes underlying the various cases cited in the Ninth Circuit's decision illustrate, different States have structured their primary systems in a variety of different ways. For example:

- The Connecticut statute in *Tashjian* said a person's listing on the named party's primary ballot confirms that person's approval by that party's nominating convention.[18]
- The Ohio statute in *Rosen* said the party name on the ballot identifies "the name of the political party by which the candidate was nominated or certified."[19]
- The Georgia statute in *Duke* said a person's listing on the named party's primary ballot confirms that person's approval by that party.[20]
- The invalidated Washington law in *Reed* said the party's name on the ballot determines whether the person is running as a candidate

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[18] *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220-21 (1986).

[19] Ohio Rev. Code §3505.03 (1986); *Rosen v. Brown*, 970 F.2d 169, 174 (6th Cir. 1992).

[20] Georgia Code §21-2-193 (1987); *Duke v. Cleland*, 954 F.2d 1526, 1527 (11th Cir. 1992); *Duke v. Massey*, 87 F.3d 1226, 1230 (11th Cir. 1996).

of that party for that party's spot on the November ballot.[21]

- The invalidated California law in *Jones* said the party's name on the ballot identifies the party of which the person would be "the nominee ... at the ensuing general election".[22]

3. Citing what *other* States have done to define what *Washington* State must have done converts Federalism's freedom into a prison.

The Ninth Circuit's decision cites cases and materials discussing the election laws in other States to note the basic function of political parties in other States, how other States use the term "nonpartisan", how other States do not let candidates use the ballot as a forum for political expression, and how primaries in other States are designed to be a meeting of party voters to nominate a party candidate, standard bearer, or ambassador to the electorate at large. Grange Pet. App. 4a-5a, 13a-14a, 17a-20a, 25a-26a, 29a.

The Ninth Circuit's decision then relies upon those observations about the way other States structure their primaries to restrict the way the Ninth Circuit will allow Washington to structure its

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[21] Wash. Rev. Code §29.30.095 & .020(3) (pre-2003 version); *Reed*, 343 F.3d at 1201; see also the Declaration Of Candidacy under that statute, which provided that the party designation signified that the person was a "candidate of" that political party. WAC 434-215-012 (pre-2003 version) (Grange Pet. App. 129a, 131a, 134a).

[22] Cal. Elec. Code §15451 (West 1996); *Jones*, 530 U.S. at 570.

primary. In so doing, the Ninth Circuit converted the freedom and flexibility that federalism guaranteed to those other States in structuring their State election systems to now be a straightjacket that prohibits Washington State from adopting a primary system different from those other States. That eliminates federalism's constitutional guarantee that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments" – for under the Ninth Circuit's approach, a single courageous State is not allowed to strike out and explore new territory on its own once other States have already worn a trail in some other direction.

For example, the Constitution allows States to structure their election systems so the primary selects the political party nominees for the November general election ballot (as did the State laws in *Rosen*, *Duke*, *Jones*, *Reed*, and *Tashjian*). But as long as federalism survives, the decision of other States to do that does not mean Washington State must now do so too.

Similarly, the Constitution allows States to structure their election systems so certain information is not allowed on the ballot (as did the State law in *Timmons*). But as long as federalism survives, the decision of another State to do that does not mean Washington State must now do so too.

The Ninth Circuit's invoking the result or function of primary systems in other States to restrict or define the system adopted by Washington State subverts the basic independence and laboratory-of-democracy purpose of federalism. It

takes what "most" States have done, and then prohibits the "single courageous State" referred to by Justice Brandeis (and quoted by this Court in *Whalen v. Roe*) from doing something different. In so ruling, the Ninth Circuit undermined the independence that federalism grants to each State under our Constitution.

CONCLUSION

Washington's top-two statute is constitutional. The Ninth Circuit's decision to the contrary imposes upon the 59 million Americans living within that Circuit's geographic domain a judicial edict that turns several principles fundamental to our Nation's form of government on their head.

The Ninth Circuit's decision inverted one of the most fundamental rights guaranteed by our Constitution, employing the First Amendment to gag rather than protect the free speech of individual persons running for office.

It contradicted this Court's ruling in *Jones*, and has thereby prevented the States within that Circuit from being able to enact top-two primary systems as authorized by this Court.

It violated the fundamental separation of powers between the judicial and legislative branches by re-writing the "candidate's preference" wording in the Washington top-two statute to instead say "party's nominee".

And it transformed the independence that federalism grants to each of the several States into a straightjacket that limits what the citizens of any

one courageous State can do by limiting them to what most other States have done.

The Washington State Grange – the sponsor of the top-two statute at issue in this case – therefore respectfully requests that this Court reverse the Ninth Circuit judgment striking down the Washington top-two statute in its entirety.

RESPECTFULLY SUBMITTED.

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